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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

FRANCES BERNARD AUER, *et al.*,
Petitioners,

v.

DAVID A. ROBBINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE LABOR POLICY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE LABOR POLICY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

The Labor Policy Association (LPA) respectfully submits this brief as *amicus curiae*.* This brief urges affirmance of the decision below and thus supports the position of the respondent.

INTEREST OF THE *AMICUS CURIAE*

The Labor Policy Association ("LPA") is an organization of the senior human resources officers of nearly 240 of this nation's largest private sector employers, collectively employing more than 11 million

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* Letters of consent from both parties have been filed with the Clerk of the Court.

Americans. Since its founding in 1939, LPA has been concerned exclusively with the development and implementation of laws and public policies relating to employment. LPA's mission is to ensure that the laws and policies affecting human resource practices in the private sector are sound, practical, and responsive to the realities of the modern workplace.

All of LPA's members are employers subject to the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201 *et seq.* Moreover all LPA member companies employ executive, administrative and/or professional "while collar" employees exempt from the FLSA's overtime provisions pursuant to 29 U.S.C. § 213 (a) (1) and the regulations and interpretive bulletins set forth at 29 C.F.R. Part § 541 *et seq.* As those regulations and interpretations explain, in order to be exempt from the overtime provisions of the FLSA, an employer must prove affirmatively that the employee meets the applicable salary basis and duties requirements. *Corning Glass Works, Inc., v. Brennan*, 417 U.S. 188, 196-197 (1974). This is a heavy burden. The presumption is that all employees are entitled to overtime and that the exemptions are to be narrowly construed against the employer asserting it. *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 295 (1959). The application of any exemption is limited to those who "plainly and unmistakenly come within the statute's terms and spirit." *Arnold v. Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190 (1966); *Walling v. General Industries Co.*, 330 U.S. 545, 548 (1947). Courts generally require that the employer's burden be met by substantial evidence on each and every element. *See Mitchell v. Williams*, 420 F.2d 67, 69 (8th Cir. 1969). Given these circumstances, all

LPA member companies are interested in, and affected by, any interpretations of the DOL's white collar exemption requirements.

LPA member companies seek to comply with DOL's exemption requirements, including the so-called salary basis test of 29 C.F.R. § 541.118. To do so, however, is complicated by the fact that the salary basis test's requirements are outdated, ambiguous and subject to varying interpretations, depending on the court in which an employer might find itself. As this case demonstrates, the liability for even the most trivial violation can be enormous. The fact that a single incident, such as a personnel policy which allegedly permits an improper deduction, could cause an employer's entire exempt workforce to be deemed nonexempt could have a devastating impact on this nation's employers.

Thus, LPA has an interest in, and a familiarity with, the issues and policy concerns presented in this case. Indeed, because of LPA's membership, it is uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case, particularly the practical implications of any decision of this court on employers.

STATEMENT OF THE CASE

Generally, the Fair Labor Standards Act of 1938 (FLSA) requires employers to pay overtime compensation to employees for hours worked in excess of 40 in a workweek. (Pet. App. 7a). FLSA provides, however, an exemption from the minimum wage and overtime requirement for those employed as "executive, administrative, and professional employees" (the so-called "white collar exemptions") as the terms are "defined and delimited from time to time by regula-

tions of the Secretary." 29 U.S.C. § 213(a)(1). (Pet. App. 7a, 75a).

In order to be exempt, an employee must be paid the requisite salary, on a salary basis and meet one of the proscribed duties tests. *See* 29 C.F.R. § 541.1 and 541.2 (Pet. App. 76a-80a). The salary basis test, as found at 29 C.F.R. § 541.118, applies to both public and private sector employees alike. While special public sector rules have been developed with respect to the docking of pay for absences of less than a day, the salary basis issues here, namely the reduction in pay for disciplinary suspensions and the proper application of the window of correction, are the same for both private and public sector employers. (Pet. App. 80a-101a). The salary basis test is not a regulation, rather it is contained in an interpretive bulletin of the Department of Labor ("DOL"). (Pet. App. 80a).

Under the salary basis test, an employee is not salaried if deductions can be made from salary for variations in the quality or quantity of work performed. (Pet. App. 8a). According to the Eighth Circuit, the mere possibility of an improper deduction does not defeat an employee's salaried status. (Pet. App. 8a). Under the salary basis test, an employee is not paid on a salary basis, and is therefore entitled to overtime compensation, if his salary is subject to reductions in pay for a violation of rules other than safety rules of major significance. (Pet. App. 9a, 82a). Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines. (Pet. App. 82a).

In 1990, in lieu of a possible termination for violating the city of St. Louis' residency requirement, a sergeant for the St. Louis police department waived his right to a hearing and accepted a two day suspension without pay. (Pet. App. 10a). This discipline was not imposed for violating a major safety rule. (Pet. App. 9a).

The salary basis test also contains a "window of correction" that states that "[t]he effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case." (Pet. App. 9a, 82a). The interpretation also states that if "a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future." (Pet. App. 9a, 82a). The deduction from pay, in this instance, occurred for reasons other than lack of work. (Pet. App. 9-10a). The disciplinary action taken against the sergeant was a one time incident that will not reoccur because the employer has since changed its policy to provide that termination is the exclusive remedy for violations of the city's residency requirement. (Pet. App. 10a). The court below determined that the department made a one time deduction and did not make the disciplinary deduction pursuant to an established policy. (*Id.*).

SUMMARY OF ARGUMENT

The salary basis test as found in 29 C.F.R. § 541.118 is an interpretation devised by DOL in the 1940's to assist it in determining whether an employee is exempt from the overtime requirements of

the FLSA by virtue of being an "executive, administrative or professional" employee. While the "salary basis test" may have been a meaningful indication of exemption status at that point in time, it is no longer certain that it has any relevance to the determination of white collar exemption status. As this case aptly demonstrates, the salary basis test is little more than an outdated interpretation which has caused enormous confusion among the courts and employers regarding its meaning and application. Since DOL has abdicated its responsibilities as the agency charged with "defining and delimiting" the exemptions tests, despite assurances since 1985 that it intends to do so, this court should give no deference to the salary basis requirement as presently defined in 29 C.F.R. § 541.118.

Moreover, strict application of the salary basis test as well as Petitioner's attempt to narrow the window of correction to amend any misdeeds is contrary to the fundamental purpose of the FLSA. Instead of protecting those employees who are most in need of protection, the FLSA is being used as a sword by well-off employees to obtain additional concessions from their employers.

ARGUMENT

I. DOL'S SALARY BASIS TEST IS AN OUTDATED INTERPRETATION WHICH HAS NO RELEVANCE TO WHETHER AN EMPLOYEE OUGHT TO BE EXEMPT FROM THE FLSA'S OVERTIME REQUIREMENT AS AN EXECUTIVE, ADMINISTRATIVE OR PROFESSIONAL EMPLOYEE

A. The Salary Basis Test Is Contained in an Interpretive Bulietin, Not a Regulation, and Is Entitled to No Deference by This Court

As Petitioner points out, the salary basis test is not a "substantive regulation" but rather is an "interpretation." (Br. of Pet'r at 3, n.1). This important distinction makes the salary basis test as written and applied suspect particularly in light of DOL's failure to revise the interpretation for over 40 years.

The salary basis test is found at 29 C.F.R. § 541.118, and is clearly marked as being in a section containing "interpretations." Unlike the "Subpart A-General Regulations" at 29 C.F.R. § 541.0-541.52, the "Subpart B-Interpretations" (where the salary basis test is contained) is written in an interpretive rather than a prescriptive manner. The fact that the salary basis test is "interpretive" rather than "legislative" is significant since:

> Legislative, or substantive, regulations are 'issued pursuant to statutory authority and . . . have the force and effect of law.' By way of contrast, a court is not required to give effect to an interpretive regulation. Varying degrees of deference are accorded to administrative interpretations based on such factors as the timing and consistency of the agency's position.

Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977).

Under the Administrative Procedures Act ("APA"), there is a distinction between substantive rules, which may be adopted only after advanced notice and comment, and "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice" which may be adopted without notice and comment rulemaking. 5 U.S.C. § 553(b).

Regulations have the force of law, *United States v. Nixon*, 418 U.S. 683, 695 (1974), unless they are found to be arbitrary, capricious, or manifestly contrary to the statute. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984). Unlike regulations, however, interpretations are not binding and do not have the force of law. *Freeman v. National Broadcasting Co., Inc.*, 80 F.3d 78, 83 (2nd. Cir. 1996). Interpretations are not promulgated pursuant to the APA and are "not conclusive even in cases in which they directly deal." *Reich v. Newspapers of New England*, 44 F.3d 1060, 1070 (1st Cir. 1995).

According to this Court, interpretive bulletins and informal rulings "provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it." *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Thus, although DOL's interpretations are entitled to some weight, they are "not entitled to the same deference as norms that derive from the exercise of . . . delegated lawmaking power." *Martin v. OSHRC*, 499 U.S. 144, 157 (1991).

B. DOL's Salary Basis Test Has Not Been Revised in Over 40 Years, Despite Widespread Changes in the U.S. Economy and Workplace, and Therefore Has No Persuasive Authority Today

Since its passage in 1938, the FLSA has always contained an exemption for executive, administrative or professional employees. 29 U.S.C. § 213(a)(1). Congress delegated defining the exemptions to the Scretary of Labor. *Id.* ("as such terms are defined and delimited from time to time by regulations of the Secretary . . ."). The first regulations which defined executive, administrative and professional employees were promulgated on October 20, 1938. 3 Fed. Reg. 2518 (1938). These regulations did not contain a "salary basis" requirement. It was not until 1940 that the rules were amended for the first time to include the requirement that an employee be "compensated on a salary basis." 5 Fed. Reg. 4077 (1940). In 1949, the salary basis language, in a report to the Wage and Hour Administrator, was reviewed to determine the need for revision or definition of the term "on a salary basis." (Pet'r J.A. at 36). (U.S. Department of Labor, Report and Recommendations on Proposed Revisions of Regulations, Part 541 Defining the Terms "Executive" "Administrative" "Professional" "Local Retailing Capacity" "Outside Salesman" [June, 1949] [The "Weiss Report"]).

According to the Weiss Report, the salary basis language was appropriate because evidence gathered at DOL hearings demonstrated that the established practice in the private sector was that "executive, administrative and professional employees" were paid on a salary basis. According to the Weiss Report:

> The evidence at the hearing showed clearly that bona fide executive, administrative and profes-

> sional employees are almost universally paid on a salary or fee basis. Compensation on a salary basis appears to have been almost universally required as the only method of payment consistent with the status implied by the term "bona fide" executive. Similarly, payment on a salary (or fee) basis is one of the recognized attributes of administrative and professional employment.

Id.

The Section 213 (a)(1) exemption regulations and interpretations were amended in 1949 to reflect the conclusions in the Weiss Report, 14 Fed. Reg. 5573 (1949), and again in 1954. 19 Fed. Reg. 4406 (1954). The salary basis test, as found at 29 C.F.R. § 541.118, has remained virtually unchanged since that time.

Whether the salary basis test is still a valid measure of whether an employee is an "executive" "administrative" or "professional" employee exempt from the FLSA's overtime requirments is unknown. DOL recognized in 1985 that a thorough review of the exemption rules was necessary. In an Advanced Notice of Proposed Rulemaking (ANPR), DOL posed a series of questions on which it hoped to receive public comments regarding "needed changes in the regulations." 50 Fed. Reg. 47696 (1985). The ANPR asked for comments on all aspects of the exemptions, including the salary, salary basis and duties tests. DOL further noted that it had determined that "there is a need for a more comprehenesive review of the regulation" and that it "had decided to broaden the scope of the review to cover all aspects of the regulations." *Id.* Despite DOL's commitment to comprehensively review all aspects of the exemption rules, the DOL has yet to act on its 1985 Advanced Notice of Proposed Rulemaking. Almost eleven

years later, employers are still waiting on the Department of Labor to act on its promise to review and revise the exemption rules to reflect the current workplace.

The rulings, interpretations and opinions of the Administrator (of the Wage and Hour division of DOL) while not controlling "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). However, "the weight of such judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* While courts often give great weight to DOL's interpretations, they depart from interpretations where their persuasive force is lacking or the law otherwise requires. *Id.*; *Reich v. Interstate Brands Corp.*, 57 F.3d 574, 577 (7th Cir. 1995) ("[W]e give the Secretary's bulletins the respect their reasoning earns them"); *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1228 (5th Cir. 1990) ("the persuasive authority of a given interpretation obtains only so long as 'all those factors which give it power to persuade' persist") (quoting *Skidmore*).

The salary basis test no longer has any power to persuade. It is an interpretation last revised by the Department of Labor over 40 years ago. During the last 40 years there can be no doubt about the dramatic changes that have occurred in both the nature of the U.S. economy in the United States, as well as the workforce itself. *See* discussion *infra*. DOL has failed to keep pace with these changes and instead determinations about exemption status must be made

based on outmoded rules whose very foundation is specious. The fact that the employer bears the burden of proving that an employee falls within the exemption criteria, *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974), further exacerbates the problem. No longer should DOL's outdated rules, including the salary basis test, be permitted to determine who is exempt from the overtime requirements.

DOL's failure to revise its interpretations in 29 C.F.R. Part 541, Subpart B has not gone unnoticed by the courts. In a recent case, *Freeman v. National Broadcasting Co. Inc*, 80 F.3d 78 (2d Cir. 1996), the court, in attempting to determine whether a NBC television newswriter/editor, producer and field producer were exempt from the overtime rquirements of the FLSA as professional journalists, focused on DOL's interpretations as found at Subpart B. *Id.* at 84. Specifically, the court in reviewing an interpretation in that subpart (29 C.F.R. § 541.302) found that its "power to persuade" was meager. *Id.* According to the court, since the interpretation (promulgated in 1949) was "non-binding, refers only to the long test and not to the short test, and is out-of-date, we accord it little weight." *Id.* The court was particularly critical of the fact that the journalism interpretations "have not changed in any material respect since 1949, long before the newspaper industry evolved into its current form." *Id.* quoting *Reich v. Newspapers of New England*, 44 F.3d 1060, 1971 (1st Cir. 1995). *See also Sherwood v. Washington Post*, 871 F. Supp. 1471, 1481 (D.D.C. 1994) (Court concluded that the 40 year old DOL interpretations "should be accorded very little weight" because of changed circumstances in the workforce).

Courts have justifiably been critical of DOL's failure to revise the exemption rules to keep pace

with changes that have occurred in the workplace over the last 40 years. Given DOL's abdication of its responsibilities in this area, the salary basis test requirements are entitled to little or no deference by this court. The Department of Labor concedes that it last reviewed the salary basis requirements over 40 years ago. While we do not question the conclusions drawn at that time by the DOL with regard to the salary basis test, there can be no argument that much has changed in the last 40 years. The rules contained in 29 C.F.R. Part 541 serve as a historical reminder to that period of time. They are written for a manufacturing economy where all workers are either "bosses" or factory line assembly workers. The rules explain in great detail concepts such as working foreman, gang leader and straw bosses, 29 C.F.R. § 541.115, antiquated concepts at best, yet fail to take into consideration the dramatic economic changes that have occurred since.

One such change is the move toward an increasingly service-oriented economy rather than a manufacturing and goods producing economy. In 1946, 41% of workers on non-agricultural payrolls worked in goods producing industries (comprised of mining, manufacturing and construction). By 1995, only 21% did. Likewise, in 1946 35% of workers on non-agricultural payrolls worked in the manufacturing industry, by 1995 that number had fallen to 16%. Council of Economic Advisors, Economic Report of the President, Table B-42, (1996). On the other hand, in 1946 45% of all workers on non-agricultural payrolls worked in service producing industries (comprised of transportation and public utilities, trade, finance, insurance, real estate and services); by 1995, 63% did. *Id.* Workers in the service industry

accounted for only 11% of all workers in 1946, by 1995 that number had increased to 28%. *Id.*

Not only has the kind of work employees are engaged in changed dramatically over the past 40 years, the workforce itself has changed as well. One major change is the dramatic increase in the levels of participation by women in the workforce. Women's labor rates almost doubled between 1948 and 1995, rising from 33% to 59%. *Id.* at Table B-35. The Bureau of Labor Statistics estimates that by the year 2005, the rate will increase to 63%. Department of Commerce, Statistical Abstract of the United States, Table 627 (1995). During this same period of time, men's participation in the workforce fell from 87% in 1948 to 75% in 1995, Economic Report of the President, Table B-35 (1996). The Bureau of Labor Statistics projects this rate to remain constant until 2005. Department of Commerce, Statistical Abstract of the United States, Table 627 (1995). In 1948, 28% of the total civilians employed in the United States were female, by 1995 that number had risen to 46%. Council of Economic Advisors, Economic Report of the President, Table 627 (1996).

Another significant change that has occurred in the workforce in the past 40 years is the significant increase in the educational attainment of workers. In 1940, 5.4% of all men and 3.7% of all women had 4 or more years of college education. Department of Commerce, Historical Statistics of the United States, Colonial Times to 1970, 380 (1975). By 1994, 25.1% and 19.6% of all men and women respectively had 4 or more years of college education. Department of Commerce, Statistical Abstract of the United States, Table 239 (1995). The increase in educational attainment can be seen at all levels. In 1970,

36% of the civilian workforce had less than a high school education; by 1991, only 13% of the workforce had attained less than a high school education. *Id.* at Table 629 (1995).

Not only has the workforce and workplace changed dramatically but so too have compensation practices. After World War II, the norm was that employees were compensated on factors wholly unrelated to performance and instead were paid time-based compensation (for example, hourly rates or salaries based on the number of hours worked). *Hearings on the Fair Labor Standards Act Before the Subcomm. on Workforce Protections of the Comm. on Economic and Educational Opportunities*, 104th Cong., 1st Sess. 104-46 (1995) (statement of Dr. Richard W. Beatty). This is no longer the case. The trend in compensation is towards increasing the use of incentives as a means of motivating performance. Incentive pay, pay for performance, employee stock option plans and other such compensation programs are increasingly popular because there is a positive correlation between ownership and performance. *Id.*; Blasi, J.R. & Kruse, D.L. *The New Owners: The Mass Emergence of Employee Ownership in Public Companies and What It Means to American Business*, Harper Business (1993). Given the change in compensation practices and the increased use of incentive programs to motivate performance it is no longer clear that being paid "on a salary basis" is the same mark of white collar status that it was 40 years ago. Salaries are no longer necessarily "fixed," a white collar employee's total compensation may consist of a number of variables—many of which did not even exist 40 years ago.

There can be no argument that the changes in the U.S. economy over the past 40 years have been significant historical developments. Few could have predicted the changes in technology and information which have so dramatically changed "work" as we know it. It is no surprise that as the United States has moved toward a service and service producing economy, and away from a manufacturing and goods producing economy, workers in the workforce are increasingly better educated. There can also be no question about the significant increase of women in the workforce over the past 40 years. In short, the workplace and workforce have been inextricably altered over the past 40 years. How work is accomplished, what kind of work is done, who is doing the work and the skills they bring to it have all changed in the past 40 years. Compensation practices have changed as well. The typical workplace of the 1940's would bear little resemblance to most workplaces today. Yet applying 1940's standards is just what employers must do in order to determine which of their white collar employees are exempt from the overtime requirements. A close look not only at 29 C.F.R. § 541.118 but at all the Part 541 white collar exemption rules, clearly demonstrates that they are dated and give little guidance to employers seeking to comply with the FLSA. Instead, the exemption rules, and in particular the requirement that an employee be paid "on a salary basis," have become traps for the unwary; a moving target whose requirements change depending on the court in which an employer finds itself. When an agency permits its interpretations to become so archaic the interpretations "power to persuade" are meager indeed and they are entitled to no weight by this Court.

II. STRICT APPLICATION OF THE SALARY BASIS TEST IN THIS CASE IS CONTRARY TO THE FUNDAMENTAL PURPOSE OF THE FLSA AND WOULD RESULT IN A WINDFALL PAYMENT OF OVERTIME TO OTHERWISE EXEMPT EMPLOYEES

This case, reduced to its essential elements, involves an otherwise exempt employee who had his pay suspended for a few days, in lieu of being dismissed, because he violated his employer's residency policy. Petitioner argues that if he is successful in this case, his suspension in lieu of dismissal should cause not just himself but all of the employer's otherwise exempt employees to be considered nonexempt employees entitled to overtime since all were "subject to" improper discipline under 29 C.F.R. § 541.118. This "subject to" argument, and the Petitioner's attempt to narrow the employer's use of the "window of correction" to amend any misdeeds, is contrary to the very purpose for which the FLSA was intended.

The FLSA was enacted in 1938 during the Great Depression to address "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). In short, Congress intended the FLSA "to aid the unprotected, unorganized and lowest paid of the nation's working population; that is those employees who lack sufficient bargaining power to secure for themselves a minimum subsistence wage." *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707 n.18 (1944).

The FLSA is properly considered a "shield to protect unwary workers," but it is certainly not meant to be used as a sword by which well-off employees obtain a "benefit from their employer for which they did not bargain." *See Freeman v. National Broad-*

casting Co., Inc., 80 F.3d 78 (2nd Cir. 1996). To allow the employees in this case to obtain back and future overtime pay under the circumstances presented would contravene the fundamental purpose of the FLSA. Instead of protecting those employees who are most in need of the FLSA's protections, this case does just the opposite. An alleged technical violation of the salary basis test is being used as a means to extract concessions from the employer, namely the payment of additional overtime.

If Petitioner's arguments prevail, then all employers who have written policies that can be misconstrued or which contradict actual practice, but which nevertheless permit for an allegedly improper deduction under the salary basis test, would be liable for back and future overtime pay for all otherwise exempt employees subject to the policy—from accountants to engineers to the CEO. This would be the case even if no actual reductions in pay occur. Even when the employer discovered a policy on the books that it wished to change, under Petitioner's view the employer would be powerless to make amends because the "window of correction" would not be available.

All of this would lead to absurd results. The determination of whether an employee is exempt from the overtime provisions, as Congress clearly intended white collar employees to be, would no longer turn on the employee's job duties or responsibilities, or even how much he or she is paid, but rather on whether an employee's employer has a personnel policy lurking on the books which may be technically inconsistent with payment "on a salary basis."

III. THE "WINDOW OF CORRECTION PURPOSEFULLY ENCOURAGES EMPLOYERS TO CORRECT SALARY BASIS ERRORS AND SHOULD BE BROADLY INTERPRETED TO EFFECTUATE THAT INTENT

The salary basis test permits an employee to retain his or her exemption status even though certain deductions have occurred. The effect of making an impermissible deduction is to be determined based upon the facts in each particular case. 29 C.F.R. § 541.118 (a)(6). The regulation further states:

> [W]here a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future. . .

Id.

The employer in this case followed the window of correction, as the court below determined. (Pet. App. 10a). Subsequent to the disciplinary incident the employer changed its policy to provide that the exclusive discipline for a violation of the residency requirement is dismissal. Nevertheless, and despite the clear language of the window of correction, Petitioner argues that correction is only available in cases of "actual mistake or inadvertence." The window of correction, however, expressly states that it is available where a deduction is "inadvertent or is made for reasons other than lack of work." 29 C.F.R. § 541.118 (a)(6) (emphasis added). The interpretation, therefore, plainly permits an employer to use the window of correction so long as the deduction was inadvertent or made for reasons other than lack of work. The Eighth Circuit found specifically in this case that the disciplinary deduction and subsequent correction fit

within the "window of correction's express requirement" that the improper deduction be made "for reasons other than for lack of work." (Pet. App. 10a).

To adopt the Petitioner's interpretation would be to forever close the window of correction. If an employer were to find that it had a personnel policy which subjected employees to improper deductions then, according to Petitioner's interpretation, an employer could not use the window of correction to change the policy because having the policy in the first place precludes the possibility that any deductions occurred because of "actual mistake or inadvertence." This interpretation would place responsible employers in a "catch 22." An improper policy on the books could result in a loss of exemption status for all white collar employees, with the possibility of litigation, back pay liability and double damages for two and possibly three years. The financial consequences could be devastating. This result would occur not because employees were misclassified as exempt because of their duties, or for that matter based on their compensation but rather because of a technical violation of the salary basis requirement. This is exactly the opposite result from what is intended by the window of correction. The window of correction is purposefully broad to encourage employers who find salary basis errors to correct those errors without further repercussions. Any interpretation to the contrary contradicts the plain language of the salary basis test.

CONCLUSION

For the reasons stated herein, LPA respectfully submits that the decision of the Eighth Circuit should be affirmed.

Respectfully submitted,

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